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ATTORNEY GENERAL

Office of the Attorney General  
State of Texas

April 16, 1991

Ms. Diana Granger  
Deputy City Attorney  
City of Austin  
P. O. Box 1088  
Austin, Texas 78767-8828

OR91-181

Dear Ms. Granger:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 10932.

You have received a request for a copy of a report commissioned by the City of Austin Electric Utility Department (EUD). We have considered the exceptions you claim, specifically sections 3(a)(1), 3(a)(4), 3(a)(10), and 3(a)(11), and have reviewed the documents at issue.

We must first dismiss your argument under section 3(a)(4). This section excepts "information which, if released, would give advantage to competitors or bidders." The test for determining whether section 3(a)(4) applies is whether there has been a showing of some specific actual or potential harm in a particular competitive situation. Open Records Decision No. 463 (1987). Your claim that if the study is disclosed, "certain possible vendors may not bid, reducing competition, and other bidders, realizing their value to the City, may bid a greater price than otherwise." Your 3(a)(4) argument is far too hypothetical to warrant an exception under this section. Moreover, we do not see how disclosure of the study would give one bidder an advantage over another, which is what this section is intended to prevent. *See* Open Records Decision No. 231 (1979).

Section 3(a)(10) is likewise inapplicable to your situation. That section protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." The report at issue concerns the history, organization, performance and strategy of various

private companies. You do not assert 3(a)(10) on the behalf of these companies; rather, you assert the exception on the city's behalf. Prior open records decisions, following the test set out by the Texas Supreme Court, have established six factors to be considered in determining whether information constitutes a trade secret:

- 1) the extent to which the information is known outside of [the company's] business;
- 2) the extent to which it is known by employees and others involved in [the company's] business;
- 3) the extent of measures taken by [the company] to guard the secrecy of the information;
- 4) the value of the information to [the company] and to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing the information;
- 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

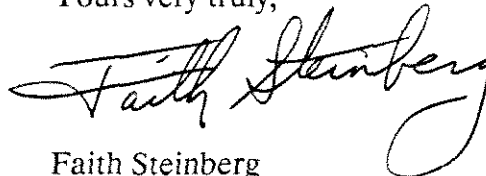
Open Records Decision No. 552 (1990), *citing* Restatement of Torts section 757, comment b (1939); *see also* Hyde Corp. v. Huffines, 314 S.W.2d 763, 776 (Tex. 1958). "To secure trade secret protection under section 3(a)(10), the governmental body must submit information that explains why the requested information is a trade secret." Open Records Decision No. 541 (1990) at 7. You have failed to show us how the criteria for determining whether information constitutes a trade secret apply to the report. Nor is it apparent that the report would constitute a trade secret under the Restatement analysis. We note that in Open Records Decision No. 319 (1982), this office held that market studies are not ordinarily excepted under section 3(a)(10). Accordingly, we do not find section 3(a)(10) applicable to the report.

However, we agree that portions of the report may be excepted under section 3(a)(11) as inter-agency advice, opinion or recommendation. Protection

under this section extends to the sections of the report comprising the consultant's actual analysis of the information and recommendations based upon it. The exception does not cover the factual material upon which the analysis and advice are based. You have marked portions of the report you believe are within the 3(a)(11) exception. We find that your markings are too broad in some instances, and have marked such portions to indicate the proper scope of the exception. Information within our markings is not protected under section 3(a)(11).

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR91-181.

Yours very truly,

A handwritten signature in black ink, appearing to read "Faith Steinberg". The signature is fluid and cursive, with the first name "Faith" and last name "Steinberg" clearly distinguishable.

Faith Steinberg  
Assistant Attorney General  
Opinion Committee

FS/lb

Ref.: ID# 10932, 10135, 11745, 11952

Enclosure: Open Records Decision Nos. 494, 463, 426, 319, 231

cc: Mr. Dick Schmidt  
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